No. 91-790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,
Petitioner,
v.
LIZZIE BEATRICE EASTERWOOD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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February 27, 1992

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LIST OF PARTIES

Pursuant to Court Rule 29.1, Petitioner respectfully refers the Court to the list of parties contained in the Petition for Writ of Certiorari previously filed. The only amendment to this listing is the addition of the *amicus curiae* in support of Petitioner, the Association of American Railroads.

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Respondent's brief in opposition proceeds from two fundamentally flawed premises. First, Respondent erroneously asserts that the Federal Railroad Safety Act ("FRSA") does not expressly preempt the state law claim at issue because it only directs the Secretary of Transportation to "study" grade crossing safety. The corollary to this assertion, equally misguided, is Respondent's claim that the Secretary's grade crossing regulations merely allocate federal funds to crossing improvement projects. Second, while Respondent acknowledges a broad

division of authority on the issue framed by the Petition, Respondent contends that this conflict is unimportant since it preexisted the panel's decision below.[1]

I.
THE FRSA AND THE SECRETARY'S GRADE CROSSING REGULATIONS ALLOCATE REGULATORY RESPONSIBILITY, NOT MERELY FEDERAL FUNDS

In order to characterize the FRSA as only a "study and funding" statute, Respondent ignores the Act's plain language and convincing legislative history to the contrary. The FRSA *explicitly* directs the Secretary to prescribe, as necessary, appropriate rules and regulations for *all* areas of railroad safety. 45 U.S.C. § 431. The FRSA also *requires* the Secretary to develop *and* implement solutions to the "grade crossing problem" under *both* FRSA authority and the Secretary's authority over highway and traffic safety. 45 U.S.C. § 433(b). Finally, and most remarkably, Respondent's truncated interpretation of the FRSA ignores *in toto* 45 U.S.C. § 434, an express preemption provision which unequivocally nullifies state law control over any area of rail safety addressed in regulations issued by the Secretary. Numerous decisions by federal courts of

[1] Petitioner also strongly disputes Respondent's statement of the case and facts. Respondent's suggestion that the preemption issues herein were only first raised on the eve of trial is incorrect. Both the trial court and the Eleventh Circuit summarily rejected this implicit claim of prejudice. *Easterwood v. CSX Transp., Inc.*, 742 F. Supp. 676, 677 (N.D. Ga. 1990); *Easterwood v. CSX Transp. Inc.*, 933 F.2d 1548, 1551 (11th Cir. 1991). Additionally, Respondent's factual narrative is devoid of record citation and refers repeatedly to non-record, inadmissible evidence submitted without excuse *after* oral argument in the trial court. The trial court properly refused to consider this untimely material, *Easterwood*, 742 F. Supp. at 677, and its use in this proceeding should not be countenanced.

appeal, all ignored by Respondent, have stated that Section 434 evinces a "total preemptive intent" by Congress over *all* areas of rail safety addressed in federal regulations. *See, e.g., National Ass'n of Regulatory Utils. Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976); *Rayner v. Smirl*, 873 F.2d 60, 65 (4th Cir.), *cert. denied* 493 U.S. 876 (1989); *see also, Petition*, p. 12 n.1 (collecting cases).

Beyond this transparent effort to rewrite the FRSA, Respondent also avoids a clear record of legislative intent to promote rail safety through the implementation of nationally uniform rules and regulations. In contrast to Respondent's fragmented citation to inapplicable legislative history, the Petition and Brief *amicus curiae* recite abundant and compelling evidence of Congress' intent to implement a federally uniform solution to the grade crossing problem, not merely to study and fund possible remedies. Indeed, the FRSA House Report described crossing accidents as a major rail safety problem that required an immediate regulatory "attack" and necessitated a "coordinated" effort by the Secretary to develop and implement solutions "under this act and pursuant to his authority over highway, traffic, and motor vehicle safety...." H.R. Rep. No. 1194, 91st Cong., 2d Sess. *reprinted in* 1970 U.S.C.C.A.N., 4104, 4116. In short, both the FRSA and its legislative history reflect with unmistakable clarity Congress' directive that the Secretary implement a federally uniform solution in this area of rail operations using "coordinated" and multi-statute sources of regulatory authority. 45 U.S.C. § 433(b).

As required by the FRSA, the Secretary issued uniform regulations addressing the improvement of grade crossings pursuant to FRSA *and* highway safety authority. *See* 49 C.F.R. § 1.48(o); 23 C.F.R. Parts 646, 655, 924. These

regulations represent exactly the "coordinated" effort mandated by the FRSA in 45 U.S.C. § 433(b). Because Congress explicitly sanctioned a coordinated regulatory effort under *both* railroad *and* traffic safety sources of authority, Section 434 of the FRSA encompasses the Secretary's grade crossing regulations within its expressly preemptive scope and bars Respondent's attempt to invoke state law regulation of the same issue. *See CSX Transp., Inc. v. Public Utils. Comm'n*, 901 F.2d 497 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 781 (1991) (FRSA preemption relates to *all* regulations regarding rail safety issued by the Secretary). In holding to the contrary, the panel below erroneously interpreted the Secretary's regulatory authority under the FRSA and failed to acknowledge Congress' stated intent that the Secretary employ diverse sources of authority to address this unique area of rail safety.

While Respondent may debate the wisdom of Congress' decision to improve rail safety through nationally uniform regulations which treat crossing safety as a traffic-control problem, Respondent cannot contest the efficacy of the scheme Congress created. *See Petition* at 6-7. These regulations, fully described in the Petition, define precisely the specific criteria for selecting, and the railroads' lack of authority and responsibility for choosing, appropriate methods of traffic-control at crossings. Respondent's assertion that the Secretary's regulations are only a means for states to access federal funds cannot be reconciled with either the substance of the regulations or Justice Kennedy's ruling while on the Ninth Circuit that the Secretary "delegated federal authority to regulate grade crossings to local agencies." *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983). Not only do the Secretary's regulations preemptively address every

aspect of selecting appropriate traffic-control at crossings, they clearly reflect a shift of responsibility for making these traffic-safety decisions from private railroads to public transportation agencies. As *Marshall* recognizes, the Secretary's regulations allocate *responsibility*, not simply federal funds.

Equally suspect is Respondent's claim that neither the FRSA nor the federal crossing regulations prohibit railroads from unilaterally installing traffic-control devices at crossings. Respondent attempts to equate the absence of authority prohibiting conduct as implicit authority for allowing juries to require such conduct and, in Respondent's view, improve rail safety through the threat of haphazard, *post hoc* damage awards. This argument, hardly persuasive under any circumstance, is particularly specious in the face of express preemption under an explicit federal statute enacted to eliminate dual federal-state control over areas addressed by federal regulations. The entire thrust of the Secretary's regulations is the implementation of a uniform approach to improving traffic safety at crossings. The entities in the best position to determine the safety needs of the travelling public — the state and local agencies with jurisdiction over the roadway — are the exact entities charged with delegated federal authority to select appropriate traffic-control devices under federally uniform standards. While railroads have a significant role in implementing the traffic-safety decisions reached by these agencies under federal criteria, railroads have no authority to subvert this preemptive and effective federal scheme by unilaterally creating private or competing systems for the evaluation and improvement of crossings without regard to the Secretary's comprehensive body of federal regulation. Indeed, this is exactly the multifarious and haphazard system of regulation

Congress sought to avoid in enacting the FRSA. *See Rayner*, 873 F. 2d at 66.

II.
RESPONDENT ACKNOWLEDGES THE NEED FOR PLENARY REVIEW OF THE ISSUES PRESENTED IN THE PETITION.

Respondent's brief clearly acknowledges a broad and growing conflict between the circuits and lower courts on the issues framed by the Petition. Respondent attempts to minimize this conflict by stating that it was not "created" by the case at bar. *Brief in Opp., at 9*. This curious distinction between the "creation" and "existence" of a conflict between the circuits does not diminish the immutable national importance, substantiality, and recurring nature of these questions.[2] Indeed, the issues raised in the Petition have generated a discordant body of opinion that renders the need for plenary review indisputable.

[2] Now, as in the Eleventh Circuit, Respondent repeatedly makes the distorted claim that a finding of FRSA preemption in this case would absolve railroads of all negligence liability. *Brief in Opp., at 5,8*. Petitioner has never urged this sweeping immunity from liability as Respondent claims and, in fact, the narrow issues before this Court do not implicate Respondent's hyperbolic concerns. The question, simply stated, is whether preemptive federal regulations, specifying that public authorities, not railroads, have the duty and responsibility to evaluate and improve traffic safety at crossings, bar state law regulation to the contrary.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Petition, this Court should grant certiorari to review the decision below.

Respectfully submitted,

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